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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 75

EL RIO OILS (CANADA) LIMITED, A DELAWARE CORPORATION,

Petitioner, and Plaintiff, Cross-Defendant and Appellant Below

against

PACIFIC COAST ASPHALT CO., INC., A CALIFORNIA CORPORATION,

Respondent, and Defendant, Cross-Complainant, Appellant and Respondent Below,

against

RALPH EDGINGTON, DOING BUSINESS UNDER THE FICTITIOUS FIRM NAME AND STYLE OF "EDGINGTON OIL REFINERY,"

Intervenor and Respondent Below

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, El Rio Oils (Canada) Ltd., a Delaware corporation, respectfully shows:

I

Summary Statement of the Matter Involved

Damages in the amount of $138,299.43 were awarded by a California court against petitioner for breach of an

alleged oral contract for the sale of oil to respondent. A California statute provides that "damages must, in all cases, be reasonable" (Cal. Civ. Code section 3359), and the highest court of California has declared that this "command of the law is controlling in every instance" (*Guerin* v. *Kirst,* 33 Cal. 2d 402, 202 P. 2d 10). It is contended that under the facts in this case the amount of the damages awarded is so clearly and unmistakably unreasonable as to constitute a denial of equal protection of the laws, and thus a violation of the Fourteenth Amendment to the United States Constitution.

Facts

In July, 1939, petitioner was the owner of the leasehold interest in an oil and gas lease executed by G. S. Chase and J. W. Chase and their respective wives, covering certain real property containing approximately two hundred acres of land located near the City of Oxnard, County of Ventura, State of California (Clk. Tr. p. 108, lines 3-8). Petitioner at that time was producing oil from a well which it had drilled on said leased premises, and was the owner of an interest in a refinery located near said oil well; the refinery was owned and operated by an organization known as the Oxnard Road Oil Company, in which the petitioner had an interest. (Clk. Tr. p. 108, lines 18-23).

In the month of July, 1939, petitioner and said G. S. Chase and J. W. Chase entered into negotiations for the formation of respondent under the laws of California, and for the acquisition by the respondent of the refinery then owned by the said Oxnard Road Oil Company (Clk. Tr. p. 109, lines 10-20). It is contended by respondent and the court found that as part of the agreement for the formation of respondent, petitioner "for a period of time equivalent to the life of production of oil from the existing well or future wells on said leased premises, would sell and fur-

nish oil from said well or wells to said corporation to be organized to the extent such oil was required and could be used and absorbed by such new company in the production and sale of asphalt and other products therefrom." (Clk. Tr. p. 109, line 24 to p. 110, line 4). Petitioner vigorously denied at the trial of the action that any such oral agreement was made. So that this Court may know that petitioner's denial of the existence of the alleged oral contract was not without substance, attention of the Court is respectfully called to petitioner's Exhibits Nos. 35 and 44 set forth in Appendix 1 hereto annexed. The court also found that it was agreed that respondent would pay to petitioner for oil delivered to respondent "the current market price or, in the absence of a current market price, the current reasonable value of the oil so delivered" (Clk. Tr. p. 111, lines 15-19). There was no posted price in the Oxnard field for oil (Rep. Tr. p. 824, lines 24-25) and there was also no true market price in that field (Rep. Tr. p. 1321, lines 2-9).

Respondent was organized under the laws of California in the month of July, 1939, and shares of its stock were issued, one-half to G. S. Chase and J. W. Chase and one-half to petitioner and its nominee; immediately after its formation, respondent entered into the operation of the refinery (Clk. Tr. p. 111, line 21 to p. 112, line 24). G. S. Chase was president of respondent at the time of the trial and had been since the incorporation of the company (Rep. Tr. p. 597, lines 9-13). He began dealing with Ralph Edgington, the intervenor in this action, in 1942 (Rep. Tr. p. 1085, lines 20-23). Eventually Mr. Edgington became virtually his only customer (Rep. Tr. p. 1086, line 6 to p. 1087, line 7).

Respondent was warned by petitioner in 1944 and 1945 that petitioner was dissatisfied with its failure to provide a steady market for petitioner's oil and that if said steady

market was not provided, petitioner would sell its oil elsewhere (Respondent's Ex. 33 and 44 and petitioner's Ex. 35 and 12). In 1946, and after these warnings, respondent had the poorest year in its history (Petitioner's Ex. 7, p. 11). The evidence shows, except for one period of forty hours, the only shutdown of petitioner's principal oil well in 1946 and early 1947 was due to a lack of an outlet for oil (Rep. Tr. p. 469, line 23 to p. 472, line 13). Petitioner's Ex. 15 shows that it was forced to shut down said well for most of the latter half of 1946.

Mr. Edgington contended and the court found that on or about January 15, 1947, Ralph Edgington and respondent entered into an oral agreement concerning the sale of asphalt by the respondent to Mr. Edgington for the year 1947 (Clk. Tr. p. 122, lines 2-5) and that on or about the 17th day of February, 1947, respondent and Mr. Edgington entered into an oral agreement modifying the prior agreement, and that the agreement, as modified, included a provision that the respondent would sell and Mr. Edgington would buy a quantity of asphalt during the year 1947 defined as follows: "All of the asphalt that (respondent) could produce from the oil produced from said well or wells on said leased premises during the year 1947" (Clk. Tr. p. 123, lines 4-14). The court further found that on or about March 20, 1947, respondent notified petitioner of the terms of its agreement with Mr. Edgington and of the modification thereof alleged to have been entered into on or about February 17, 1947 (Clk. Tr. p. 123, line 25 to p. 124, line 2). The evidence relied on to establish notice to petitioner of the alleged Edgington contract was testimony by Mr. G. S. Chase, president of respondent, that on or about March 20, 1947, when he talked to a Mr. von Bohm, managing director of petitioner, he told Mr. von Bohm "Mr. Edgington has

said that he would take all of our asphalt the rest of the year." (Rep. Tr. p. 809, lines 2-5).

Under date of March 18, 1947, petitioner entered into a contract with another corporation for the sale of petitioner's oil for a period of two years (Respondent's Ex. 9).

The present litigation began when the petitioner filed a complaint for dissolution of respondent on April 7, 1947 (Clk. Tr. pp. 1-5). On April 9, 1947, G. S. Chase sent a telegram to the president of petitioner, Mr. McLaren, in which he advised the latter that he *could* get a one year contract with Mr. Edgington for total production (Petitioner's Ex. 40), which telegram is set forth in Appendix 2. Mr. Chase did not confer with Mr. Edgington about the matter until after the telegram had been sent (Rep. Tr. p. 1100, lines 13-15). Thereafter, Mr. Chase filed a cross-complaint on behalf of respondent against petitioner in which he alleged, in addition to a claim for damages for non-delivery of petitioner's oil to respondent, and other things, that respondent was bound by an oral contract to deliver asphalt to Mr. Edgington for the year 1947. (Clk. Tr. pp. 10-24). Mr. Edgington filed a complaint in intervention in which he also claimed the existence of an oral contract on the part of respondent to deliver asphalt to him during the year 1947.

A receiver for respondent was appointed by court order on April 15, 1947 (Clk. Tr. pp. 142-143) and this order was amended on May 1, 1947 so as to provide that the receiver "shall have the power to and shall take over and manage the business and affairs of the defendant corporation and shall preserve its property pending the hearing and determination of the complaint for dissolution herein." The amendment also added a provision permitting respondent to assert in the pending action an "alleged" contract be-

tween respondent and petitioner, and the same order was made as to the "alleged" Edgington contract (Clk. Tr. pp. 144-145).

Petitioner sold no oil to respondent after April 7, 1947, but the receiver purchased from Edgington all of the oil produced by petitioner during the months of April, May and June, and part (or perhaps all) during the month of July, 1947, and manufactured the same into asphalt, which, in turn, was sold to Mr. Edgington (Rep. Tr. p. 1166, l. 24 to p. 1168, l. 16; p. 1047, l. 7 to p. 1048, l. 3).

On the first day of the trial (April 13, 1948) petitioner introduced into evidence as its Exhibit 7 the report of the auditor for the receiver of respondent, covering operations of respondent from the time it began on July 15, 1939, through the date of the appointment of the receiver on April 15, 1947. Said report shows the following record of earnings by respondent during said period of time:

	Net Income or (Loss) Before Income Tax	Net Income or (Loss)
July 15, 1939 to Feb. 29, 1940	$(2,588.56)	$(2,588.56)
Fiscal Year Ending Feb. 28, 1941	150.09	150.09
" " " Feb. 28, 1942	(275.75)	(275.75)
" " " Feb. 28, 1943	(1,610.25)	(1,610.25)
" " " Feb. 29, 1944	3,017.14	2,593.61
" " " Feb. 28, 1945	7,986.08	5,902.84
" " " Feb. 28, 1946	(2,672.65)	(2,672.65)
" " " Feb. 28, 1947	(3,675.82)	(3,675.82)
March 1, 1947 to April 15, 1947	751.37	593.58
Total	1,081.65	(1,582.91)

The computation of a loss of profits of respondent, during a maximum period of one year and five months, show an estimated loss of $90,118.29. For the period from April 7, 1947, through December 31, 1947, Mr. G. S. Chase, President of respondent, computed the estimated loss of profits as follows:

He took the figures for the actual production of oil by petitioner during that entire period, including the months

of April, May, June, and July, during which the receiver had in fact purchased oil produced by petitioner; he then assumed that respondent could have purchased all of this oil at 51¢ per barrel, manufactured therefrom a certain number of tons of asphalt and distillate, sold all the asphalt at $5.50 per ton and the distillate at $2.00 per barrel, made a refinery charge to petitioner of 30¢ per barrel for distillate petitioner used in producing the native crude oil from the well, and after allowing for estimated expenses, Mr. Chase ended with an estimated net profit of $40,499.92, which he claimed respondent lost during the 9 month period (Rep. Tr. p. 827, l. 7 to p. 836, l. 24).

For a portion of the year 1948 Mr. Chase took an estimated production by petitioner of 13,000 barrels of oil per month from January 1, 1948, to the date of the trial, assumed that he could have purchased that oil for a price of $1.17½ per barrel, manufactured a certain number of tons of asphalt and distillate therefrom, sold all the asphalt at $11.00 per ton and the distillate at $2.94 per barrel, made a refining charge of 30¢ per barrel for distillate petitioner used in producing the native crude oil, and, after allowing for estimated expenses, Mr. Chase ended with an estimated net profit of $7,940.80 *per month,* which he claimed represented the loss during each of the months of January, February, March, and April, 1948 (Rep. Tr. p. 836, l. 25 to p. 838, l. 25), making a total for those first 4 months of $31,763.20 (Clk. Tr. p. 126, ll. 4-7).

Mr. Chase testified, however, during the course of the trial that he had agreed that the refinery would be operated on the basis that petitioner was to be given the most that could be paid for its oil "until both companies got on their feet" (Rep. Tr. p. 857, ll. 20-22; p. 844, ll. 11-13; p. 888, l. 24 to p. 889, l. 3). That Mr. Chase understood this arrangement would still be in effect appears from his testi-

mony at page 810 of the Reporter's Transcript, lines 5-10; see also his testimony at page 753, line 3, of the Reporter's Transcript. It may also be noted here that there is no testimony whatsoever in the record that the alleged 1939 contract was for the *sale* of oil to respondent, Mr. Chase's testimony, if taken as true, being merely that the agreement was that all of El Rio's production of oil had "to go through" the refinery; see testimony of G. S. Chase at pages 639-656; 850-888; and 921-931 of Reporter's Transcript. See also testimony of J. W. Chase at pages 1117-1126 of the Reporter's Transcript.

Following the close of the trial in April, 1948, the trial court took the matter under submission, and, on or about August 10, 1948, notified counsel for the respective parties by letter that he was going to give judgment in favor of respondent and in favor of Ralph Edgington. Thereafter and on or about August 25, 1948, petitioner, for the purpose of proving that the fantastic figures used in computing loss of profits were utterly ridiculous, offered to deliver all the oil it produced to the receiver; the record shows, however, that, as late as November 23, 1948, when the case was reopened, the receiver had still not started to operate the refinery. The Court found that the receiver should have commenced taking the oil produced by petitioner by September 5, 1948, and did not permit respondent to recover any alleged loss of profits beyond that date (Clk. Tr. p. 126, ll. 11-23). See in connection with this matter petitioner's Exhibits Nos. 45 and 46.

Upon the reopening of the case on November 23, 1948, damages for the period beginning with the month of May were computed in substantially the same manner as the prior damages had been computed (Rep. Tr. p. 1270, l. 16 to p. 1281, l. 16). The total damages for the period from May 1, 1948, to September 5, 1948, were found by the Court

on the basis of these computations to be $17,855.87 (Clk. Tr. p. 126, ll. 8-10).

Mr. Edgington based his claim for damages upon the difference between the price for which Mr. Chase had agreed to sell him respondent's asphalt and the average price he paid for other asphalt during the period from April 1 through December 31, 1947. He estimated his total damages for this period as being $48,181.14 (Rep. Tr. p. 1172, l. 3 to p. 1207, l. 17). This sum of $48,181.14 for damages for non-delivery of asphalt for 9 months is considerably greater than the total value of respondent's assets on April 15, 1947, as shown by the report of the auditor for the receiver (Petitioner's Exhibit No. 7). In spite of this, the record is barren of any evidence that G. S. Chase, President of respondent, made any effort at any stage of the proceedings to protect respondent from the Edgington claim. That Mr. Chase had no interest in defeating this claim became very apparent, when he was examined by counsel for Mr. Edgington as a supposedly adverse witness (Rep. Tr. p. 1084, l. 17 to p. 1101, l. 2). Never did an attorney have a more willing witness. Contrast the answers he then gave with the answers Mr. Chase gave when cross-examined by the attorney for petitioner (Rep. Tr. pp. 842-906). Further, Mr. Chase had testified that he had received a letter, dated February 3, 1947, from Edgington Oil Refinery within the first two weeks of February of that year, which letter is respondent's Exhibit No. 39. However, Mr. Chase later admitted, under cross-examination, that as of the date of a conversation he had with Mr. von Bohm, petitioner's managing director, in April, 1947, he had not received said letter (Rep. Tr. p. 1078, ll. 15-19; p. 1080, ll. 10-23).

Judgment against petitioner for the sum of $138,299.43 was entered January 6, 1949 (Clk. Tr. pp. 137-141). The

California District Court of Appeal, Second Appellate District, Division Two, affirmed said judgment on December 20, 1949 (one of three judges dissenting). A petition for rehearing was filed and denied, and a petition for hearing in the California Supreme Court was filed, and denied on February 16, 1950.

Question Presented

Upon the foregoing facts, the question presented is whether the award and affirmance thereof of damages against petitioner in the sum of $138,299.43 is so clearly and unmistakably unreasonable as to constitute a denial to petitioner of the protection of Section 3359 of the California Civil Code and thus a violation of the Fourteenth Amendment of the United States Constitution.

II

Basis for Jurisdiction to Review Judgment in Question

The statute granting the power to review herein is U. S. Code, Title 28, Section 1257 (62 Stat. 929). The right claimed under the Constitution of the United States is the right to equal protection of the laws of the State of California, as guaranteed to petitioner by the Fourteenth Amendment of the United States Constitution. The specific law involved is Section 3359 of the California Civil Code which reads as follows:

> "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

The California Supreme Court, the highest court in that state, has held that "this command of the law is controlling in every instance" (Guerin v. Kirst, 33 Cal. 2d, 402, 202 P. 2d, 10).

Petitioner asserts that the award of damages against petitioner in the sum of $138,299.43 is so clearly and unmistakably unreasonable under the facts of this case as to constitute a denial to petitioner of the protection of said section 3359 of the California Civil Code, and thus a violation of the Fourteenth Amendment of the United States Constitution.

III

Reasons Relied on for the Allowance of the Writ

The principal officers and shareholders of petitioner are Canadians, and the main office of petitioner is in Toronto, Canada. The practical result of a final affirmance of the judgment in this case would be to take from these Canadians and hand to the California residents here involved the oil wells in which the Canadians have invested a great deal of money, and their interest in the refinery owned by respondent. Such a result is not only shocking to the judicial conscience but unfortunate in its effect on American-Canadian relationships. It is common knowledge that in this critical period in our history cooperation between Canada and the United States is important to the security of this country. Petitioner does not contend that legalized theft by a few Americans of the property of a few Canadian nationals will, in itself, destroy the cooperation between the two countries. But who can say that the inevitable bitterness engendered in the minds and hearts of the Canadian business men here involved, over the taking of their property, will not influence future decisions by Canadian nationals on matters important to American security? Further, of greater importance is the fact that confidence in the judicial process in America demands that the laws of the states be applied equally and without favor to all litigants, whether they be local residents or outsiders.

The California Courts in this case have ignored the provisions of Section 3359 of the California Civil Code and

have thus, in effect, refused to apply said section in favor of petitioner. In this case, in view of the fundamental character of said law, as interpreted by the highest Court of the State of California, the refusal by the Courts of that state to give petitioner the protection of said law affects a substantial federal right of petitioner under the Fourteenth Amendment to the United States Constitution. The question herein presented has never been passed upon by this Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the District Court of Appeal of the State of California, Second Appellate District, Division Two, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket Civil No. 17280, El Rio Oils (Canada) Limited, a Delaware corporation, Plaintiff and Cross-Defendant and Appellant, vs. Pacific Coast Asphalt Co., Inc., a California corporation, Defendant and Cross-Complainant, Appellant and Respondent, vs. Ralph Edgington, doing business under the fictitious firm name of "Edgington Oil Refinery", Intervenor and Respondent, and that said decision and judgment of the said District Court of Appeal of the State of California may be reversed by this Honorable Court, and that your petitioner may

have such other and further relief in the premises as to this Honorable Court may seem meet and just.

EL RIO OILS (CANADA) LIMITED,
JOHN LEWIS KELLY,
KENNETH DODSON MILLER,
Counsel for Petitioner.

DOLLEY, KNIGHT, WOODS & HIGHTOWER,
ARTHUR B. KNIGHT,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 75

EL RIO OILS (CANADA) LIMITED, A DELAWARE CORPORATION,

Petitioner, and Plaintiff, Cross-Defendant and Appellant Below,

Against

PACIFIC COAST ASPHALT CO., INC., A CALIFORNIA CORPORATION,

Respondent, and Defendant, Cross-Complainant, Appellant and Respondent Below,

Against

RALPH EDGINGTON, DOING BUSINESS UNDER THE FICTITIOUS FIRM NAME AND STYLE OF "EDGINGTON OIL REFINERY",

Intervenor and Respondent Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The judgment of the Superior Court of the State of California, in and for the County of Ventura, awarding

damages against petitioner in the amount of $138,299.43, is dated January 5, 1949, and is found at pages 137-141 of the Clerk's Transcript. The opinion of the District Court of Appeal of the State of California, Second Appellate District, Division Two, affirming said judgment is dated December 20, 1949, and is found immediately preceding the certificate of the Clerk of said Court in the portion of the record certified by said Clerk that includes the Clerk's transcript on appeal, the supplement thereto, and the supplement to the Reporter's transcript. It is reported in 95 Advance California Appellate Reports, page 227. It has not yet been officially reported.

Jurisdiction

The statute granting the power to review herein is U. S. Code, Title 28, Section 1257. The date of the decision and judgment to be reviewed is December 20, 1949. A petition for a hearing in the California Supreme Court was denied February 16, 1950.

Statement of the Case

The statement of the case has been given under heading I in the petition submitted herewith and hence the statement is not repeated here.

Specification of Error

The District Court of Appeal of the State of California, Second Appellate District, Division Two, erred in affirming the judgment of the Superior Court of the State of California, in and for the County of Ventura, in that the judgment against petitioner was for damages in an amount that is clearly and unmistakably unreasonable and therefore contrary to the provisions of Section 3359 of the California Civil Code and a violation of the Fourteenth Amendment of the United States Constitution.

ARGUMENT

POINT I

The Action of State Courts Is State Action Within the Provision of the Fourteenth Amendment That No State Shall Deny To Any Person Within Its Jurisdiction Equal Protection of the Laws

In *Shelley* v. *Kraemer,* 334 U. S. 1, 92 L. Ed. 1161, it was held that the action of state courts and of judicial officers in their official capacities, even though taken for the enforcement of private agreements, is state action within the provision of the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws.

POINT II

The Judgment Herein and Affirmance Thereof Constitutes a Denial to Petitioner of the Protection of Section 3359 of the California Civil Code

Section 3359 of the California Civil Code reads as follows:

> "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

In *Guerin* v. *Kirst,* 33 Cal. 2d, 402, 202, P. 2d, 10, it was held that this statute was controlling in every instance. In disregard of this statute, the California Courts gave and affirmed a judgment against petitioner in an amount that is clearly and unmistakably unreasonable under the facts in the case.

Damages in the amount of $138,299.43 awarded against petitioner (hereinafter under this heading referred to as El Rio) and in favor of respondent (hereinafter under this heading referred to as PCAC) are unreasonable for the following reasons:

1. Assuming that El Rio in fact was under legal obligation, enforceable by PCAC, to deliver all of its oil to PCAC, the maximum period claimed as a breach of such obligation is one year and five months. The damages awarded included the sum of $90,118.29 for alleged loss of profits during said period of one year and five months. El Rio's Exhibit No. 7 showed that the operations of PCAC from the time of its organization in July, 1939 through April 15, 1947, resulted in a net loss, after taxes, and that the maximum profit PCAC made in any twelve month period, after taxes, was the sum of $5,902.84. Using this maximum figure for a twelve month period and projecting that rate of profit for an additional five months would result in a total profit PCAC could reasonably have been expected to make, based upon its earnings history, in the sum of $8,362.34, or less than ten per cent of the sum of $90,118.29 allowed as damages for loss of profits.

2. The computation of damages fails to take into account the rule that where there is more than one method of estimating damages, that method which is most definite and certain should be adopted; and, if either of two measures will fully compensate the injured party for his loss, that measure which is less expensive to the wrong-doer must be adopted. 25 Corpus Juris Secundum at p. 562. In the instant case, if the testimony of the Chase brothers is taken at its full face value, it is clear that the alleged obligation on the part of El Rio to have its oil "go through" the refinery could be satisfied by the processing of that oil by PCAC for a reasonable refining charge. The evi-

dence shows that PCAC made a 30¢ per barrel refining charge for distillate refined for El Rio (Rep. Tr. p. 835, lines 1-7), and it may be presumed that this would be a fair charge for refining the oil. On this basis, the total loss of profits for PCAC for the period April 7, 1947 to September 5, 1948 (the date the court found the receiver should have started taking El Rio's oil pursuant to its offer) would be $7,333.02.

3. The computations for the alleged loss of profits are based upon an assumption that El Rio was required to sell its oil to PCAC at a price of 51¢ per barrel during all of 1947, and at a price of $1.17½ per barrel during the year 1948. There was no evidence whatsoever that El Rio was required to sell its oil to PCAC at such prices. It is very apparent from the terms of the contract El Rio made on March 18, 1947, with Douglas Oil Co. of California for the purchase of the El Rio oil that El Rio at that time would not have been satisfied to sell its oil to PCAC during all of the year 1947 for anything less than 53¢ per barrel, with a free return of the distillate it used in the production of oil (PCAC Ex. 9). There is likewise no evidence that El Rio would have been legally bound to have sold its oil to PCAC in the year 1948 at $1.17½ per barrel. There was no posted price in the Oxnard field for oil (Rep. Tr. p. 824, lines 24-25), and there was also no true market price in that field (Rep. Tr. p. 1321, lines 2-9). Under these circumstances, it can scarcely be stated with fairness that El Rio would have no voice in fixing a reasonable price that would be charged for its own oil.

4. Under the order appointing the receiver of PCAC and the amendment thereof (Clk. Tr. pp. 142-45), it is apparent that only the receiver had the power to manage the business and affairs of the defendant corporation pending the hearing and determination of the complaint for dissolu-

tion. There is no evidence in the record whatsoever as to what profits the receiver could have made had he been given the El Rio oil during the receivership. At the time of the re-opening of the case for taking of additional evidence on November 23, 1948, the evidence showed he was still not operating the refinery, although the court found that on August 25, 1948, El Rio offered to deliver all oil produced by it to the receiver, and that a reasonable time within which said receiver should have commenced taking said oil expired on September 5, 1948 (Clk. Tr. p. 126, lines 11-16). A receiver who had not even started operations at the refinery at a time two and one-half months after the date the operations should have commenced certainly could not be expected to make a net profit of $90,118.29 during a period of one year and five months.

5. The loss of profits awarded PCAC for a period of less than a year and a half is in an amount more than twice the value of its entire assets as of April 15, 1947 (El Rio Ex. 7).

6. Mr. Chase himself testified that the agreement was that the refinery would be operated on the basis that "there would be no profits until both companies were on their feet" (Rep. Tr. p. 857, lines 20-22), and it is apparent from El Rio's Exhibit 51 that even as of October 31, 1948, El Rio was still not on its feet financially. Mr. Chase had testified that the understanding was they would try "to set the price of oil so that PCAC would break even" (Rep. Tr. p. 844, lines 11-13), and that the purpose was to give El Rio the most it could get for its oil "until both companies got on their feet" (Rep. Tr. p. 888, line 24, to p. 889, line 3). That Mr. Chase understood this arrangement should still be in effect in 1947 appears from his testimony at page 810 of the Reporter's Transcript, lines 5-10. See also his

testimony at page 751, line 13, through page 753, line 3 of the Reporter's Transcript.

7. The total damages allowed included a refining charge of 30¢ per barrel for refining and returning to El Rio the distillate which it had injected into the well. There is no evidence that El Rio would have been satisfied to allow PCAC to make this refining charge. Note that in the contract of March 18, 1947, between El Rio and Douglas Oil Co. of California the latter agreed to return to El Rio free of cost the distillate El Rio had injected into the oil (PCAC Ex. 9). Note also that it was stipulated between counsel for PCAC and counsel for El Rio on November 24, 1948, that one of the producers in the Oxnard field not only got a price of $1.17½ per barrel for its oil, but also got a free return of the distillate it had injected into the well (Rep. Tr. p. 1411, lines 8-16).

8. Perhaps the most glaring error in the method of computing the damages lies in the fact that although all of the El Rio production of oil for the months of April, May, and June and for all or part of July, 1947, was in fact purchased by the receiver of PCAC and manufactured into asphalt (Rep. Tr. p. 1166, line 24, to p. 1168, line 16; p. 1047, line 7, to p. 1048, line 3), the figure used as a basis for computing the damages includes the number of barrels produced by El Rio during those months of April, May, June, and July of 1947 (Clk. Tr. p. 127, lines 10-12).

9. As shown by the statement of facts in the petition, Mr. Chase has no apparent interest in the defeat of the Edgington claim. It may, therefore, be presumed that Mr. Chase is not too much concerned about the possibility that PCAC will ever have to pay the $48,181.14 to Mr. Edgington. In view of this fact, it was error to add to the judgment against El Rio said sum of $48,181.14, and the

following rule set forth in 8 California Jurisprudence 760 should be applicable:

> "Damages which a plaintiff has sustained through inability to perform his contract with a third person, owing to defendant's breach of contract with him, are ordinarily too remote to be recovered."

Conclusion

For the foregoing reasons petitioner respectfully prays that the writ of certiorari herein petitioned for may be issued, and that the aforesaid decision and judgment of the District Court of Appeal of the State of California, Second Appellate District, Division Two, may be reversed by this Honorable Court.

Dated: May 12, 1950.

EL RIO OILS (CANADA) LIMITED,
JOHN LEWIS KELLY,
KENNETH DOBSON MILLER,
Counsel for Petitioner.

DOLLEY, KNIGHT, WOODS & HIGHTOWER,
ARTHUR B. KNIGHT,
Of Counsel.

APPENDIX 1

EL RIO EXHIBIT No. 35

NATIONAL LUMBER COMPANY, LIMITED

Manufacturers and Wholesalers of Softwood and Hardwood Lumber

Cable Address "Wilklar"
Duncan McLaren
President
C. W. Wilkinson
Vice President &
Managing Director
D. C. Johnston
Secretary-Treasurer

Telephone Elgin 4438
Victory Building
80 Richmond Street West
Toronto, Canada

Copy for Mr. Von Bohm

Feb. 19, 1944.

Mr. Glywn S. Chase,
Foothills Road,
Ojai, Ventura Co.,
California.

DEAR CHASE:

I returned from the East after being away ten days, and have a letter from Mr. Conway enclosing statement to the end of December. I have also had letters from Victor Von Bohm which not only disappoint but alarm me.

The small amount of asphalt sold since I was down there seems to me unbelievable. When I left there it was certainly understood by us all that the well had to run at its full production in the sale of oil or asphalt. We have drifted back to the old groove previous to my visit there, and this has to be corrected at once.

We want a contract covering any deal we make with the Asphalt Company and failing that, El Rio will have to run the well at its full production and sell the oil elsewhere. There is no use continuing as we have for the last years.

It is the 19th of February and I sit up here and don't know what was produced for the month of January.

I have no definite word that a contract has been signed with Edgington or any person else. When I telephoned you, you were sure you could make a better contract with Edgington. Has it been made, if so you had better have a contract made between El Rio and the Asphalt Company and live up to the terms of the contract, otherwise El Rio will be reluctantly forced to make a separate deal for its own oil, where they can get paid every two weeks or monthly.

I am certainly fed up to the eyes with disappointment and there has to be an immediate change so I trust I will hear definitely from both you and the Baron just where we stand, as there are other people wanting to buy our oil. I dislike very much feeling as I do about this whole matter, but I am not going through an experience such as I have in the past. I do not enjoy misery of this kind. Please advise me definitely whether or not the Asphalt Company is going to take the full production of the Well as, if they are not, we must make other arrangements immediately. You know that when I left you there was one stipulation—the well had to run at its full capacity.

Trusting to hear better news from you, I remain

DMcL:B Yours truly,

D. McLaren.

(Postcript omitted.)

El Rio Exhibit No. 44

Chase Brothers
R. D. Box 227
Oxnard, California

September 11, 1944.

Mr. Duncan McLaren,
Toronto, Ont.

Dear Mr. McLaren:

Von Bohm tells me that arrangements are being made for two more wells. About ten days ago, on Sunday, Edgington

came to Oxnard for a meeting with Delaney and Roberts. Roberts was not there but Delaney was. According to Edgington he was offered a crude contract, evidently on the present well and another well which was to be drilled. He turned down the offer. Edgington is satisfied with the present deal on asphalt and I have discussed with him the possibility of a long-term arrangement. He might even buy an interest in the plant. However, it will not do to have several people trying to do business with him. It is the only connection we have had which has been profitable to both the Refinery and El Rio, so let's not spoil it by lack of cooperation. After the meeting, Edgington came up to Ojai to see me and find out what was up. All I could tell him was that if another well was drilled the oil would probably go through the Refinery here as the El Rio owned a one-half interest. He can get his crude from Exeter, so we do have to be careful.

In spite of the fact that El Rio does not heat or treat the crude oil, nor is charged by the Refinery for heating or treating, but receives 51¢ per bbl., for the crude as it comes from the well, Chase Bros. have been charged a 5¢ per bbl., heating and treating charge on their royalty oil. Just how can this be explained? It is certainly beyond me.

Several months ago Roberts said I would have to sue El Rio to straighten out the gas-oil problem, and Von Bohm says we will have to take what he offers or sue. Personally, I agree with you—we should know more about this than the attorneys, and should settle it ourselves. However, I will need quite a bit of money for harvesting immediately, and to have to borrow money and pay interest while our royalty is tied up by El Rio is provoking.

The price of asphalt was increased for one month and the price of crude was therefore increased to 58¢ this month. It is possible that we will have to lower the price some next month.

Sincerely,

GLYWN S. CHASE.

P.S. The Exeter-Vaca price is 42¢ and they have to heat and load the oil.

APPENDIX 2

Text of telegram from G. S. Chase to Duncan McLaren, dated April 9, 1947 (Exhibit No. 40 of El Rio Oils (Canada) Limited).

I an (I can) get a one year contract with Edgington for total production unable to locate Vonbohn understand another deal pending for crude but suggest you reconsider and avoid unnecessary expense for everyone wire answer immediately.

(9589)

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 75

EL RIO (CANADA) LIMITED, A Delaware Corporation,
Petitioner, and Plaintiff, Cross-Defendant and Appellant Below,

against

PACIFIC COAST ASPHALT CO., INC., A California Corporation,
Respondent, and Defendant, Cross-Complainant, Appellant and Respondent Below,

against

RALPH EDGINGTON, Doing Business Under the Fictitious Firm Name and Style of "Edgington Oil Refinery"
Intervenor and Respondent Below

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This action involved only questions of California law. No Federal question was raised in the State Court at any time and none was involved. Petitioner filed an action for dissolution of respondent corporation relying on California law. Respondent cross-complained for breach of contract seeking specific performance and for damages. The trial court whose decision was affirmed on appeal denied Petitioner's request for dissolution of respondent corporation

and made a specific finding that the sole motive of Petitioner in bringing the action for dissolution was to avoid its contractual obligation. The trial court awarded respondent damages and decreed specific performance of the contract.

FACTS

The statement of facts presented by petitioner in its petition, brief and affidavits is inaccurate and misleading. When convenient, the petitioner states its construction of the evidence and disregards the findings of the trial court made on other conflicting evidence. In other instances it states only a portion of the facts or findings pertinent to the case. Throughout, petitioner asserts and alleges matters wholly outside the record and concerning which there is no evidence.

A sufficient and correct statement of the facts and issues involved in this case appears in the decision of the District Court of Appeal which is reported in 95 Advance California Appellate Reports (ACA) 227, 213 P. 2d 1. We quote from a portion of that Opinion. "Plaintiff" refers to "Petitioner" herein and "Defendant" refers to "Respondent" herein.

> "In 1937, plaintiff (Petitioner) drilled an oil well on leased land. In 1938, with the permission of lessor, a refinery was constructed on the leased premises in which refinery plaintiff owned an interest. The purpose of the refinery was to refine and manufacture asphalt from the oil produced by plaintiff. This venture was a failure and in 1939 plaintiff was on the verge of bankruptcy and sought the assistance of the lessors (the Chases) of the land upon which it had drilled an oil well.
>
> "As a result of various negotiations plaintiff and the Chases entered into an agreement for the formation of defendant corporation (Respondent). Plaintiff and the Chases were to have an equal stock ownership in defendant and each was to provide an equal share of the capital to successfully operate defendant. The Chases were to devote their time and attention to the management of defendant and plaintiff agreed to

furnish for the life of the wells all oil produced on the leased premises to the extent that such oil could be used by defendant in the production and sale of asphalt and other products. It was agreed that plaintiff would not sell its oil to anyone but defendant but that defendant could sell any oil in excess of its own requirements which plaintiff produced.

"Pursuant to the agreement defendant corporation was organized and stock issued in equal amounts to plaintiff and the Chases. After defendant corporation was formed the Chases took over the active management of the company. Plaintiff did not furnish its share of the financial assets necessary for the operation of the company. Defendant company did not prosper and early in 1940, plaintiff and defendant mutually agreed to modify their original contract as to the method of fixing the price of oil sold by plaintiff to defendant. In effect it was agreed that defendant would continue its efforts to develop a market for the oil produced by plaintiff and that plaintiff would accept for the oil the price which defendant was able to pay and continue in operation. In 1943, when defendant's operations became successful this arrangement was terminated and the provisions in the original contract were resumed, to wit, that defendant should pay plaintiff the current market price for the oil purchased.

"In May 1944 plaintiff and defendant agreed to another modification of their original contract by providing that plaintiff should have the right to sell to anyone the oil produced by it over and beyond the requirements of defendant. As thus modified both parties continued to operate according to the agreement through the year 1945.

"In 1947, defendant entered into a contract with intervenor (Edgington) to sell all of the asphalt produced from the oil located on plaintiff's lease during the year 1947, and intervenor agreed to buy the same. Plaintiff had notice of this contract. Plaintiff continued to perform its agreement with defendant until on or about April 7, 1947, on which date it refused to deliver to defendant oil produced from its wells, and thereafter refused to deliver any oil to defendant. On April 7, 1947, plaintiff filed a complaint seeking the dissolution of defendant corporation on the ground that

internal dissension existed between the stockholders of defendant corporation and that its business could no longer be continued with advantage or profit to the stockholders.

"Defendant filed a cross-complaint against plaintiff seeking (1) specific performance of its contract with plaintiff and (2) damages for breach of the contract. Thereafter intervenor filed a complaint in intervention seeking damages against defendant for breach of its contract with him.

"FINDINGS

"The trial court found that:

1. It was not true that there was such internal dissension between the stockholders of defendant that its affairs could not be conducted with advantage or profit to the stockholders, but that the sole motive of plaintiff in filing the suit for dissolution of defendant corporation was to avoid its contractual obligation to deliver all the oil produced on its lease to defendant.

2. Plaintiff has entered into an agreement to deliver all the oil produced on its lease to defendant.

3. Defendant had entered into an agreement with intervenor to sell all the asphalt produced from the oil furnished by plaintiff to the intervenor who had in turn agreed to purchase all of said asphalt.

"JUDGMENT

"The trial court entered judgment (1) decreeing specific performance of the contract between plaintiff and defendant; (2) awarding defendant damages against plaintiff for the breach of its contract, and (3) awarding intervenor damages against defendant for breach of its contract with intervenor." (95 ACA 227, 231-233; 213 P. 2d 1.)

For the convenience of the Court attached as Appendix "A" is a more detailed statement of the facts.

ARGUMENT

I.

Petitioner Fails to Comply with Rules of This Court

The petition for writ of certiorari does not meet the requirements of Rules 12 and 38 of the Rules of the Supreme Court of the United States, which set forth requirements when review of a state court judgment is sought by petition for writ of certiorari.

The petition makes no attempt to furnish the information required by those rules. It does not show that the questions involved are substantial; it does not specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them; the way in which they were passed upon by the court and with pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provisions believed to confer jurisdiction on this court.

Failure to comply with the requirements of Rules 12 and 38 is a sufficient reason for denying the petition for writ of certiorari.

> *Rule 38, Paragraph 2, Rules of the Supreme Court of the United States.*

In many cases this Court has denied petitions for writs of certiorari where petitioners failed to comply with Rules 12 and 38 of the Rules of the Supreme Court of the United States.

> *Winston* v. *Courtney,* 322 U.S. 731, 88 L. ed. 1566, 64 Sup. Ct. 944;
> *Kennemer et al.,* v. *Billington,* 323 U.S. 709, 89 L. ed. 570, 65 Sup. Ct. 34.

II.

Petition Raises Point Not Presented to State Courts

The point now raised by petitioner purporting to give jurisdiction to the Supreme Court of the United States was not raised in, nor was it considered or passed on by, the state courts. No provision of the United States Constitution, or of any Federal statute or law was raised, mentioned or discussed in this case before the trial court, the District Court of Appeal or the Supreme Court of California.

As pointed out in Point I above, the Petitioner utterly fails to comply with Rules 12 and 38 of this Court by setting forth how or when petitioner asserted the federal question or where or how it was raised in the state courts. We state affirmatively that the petitioner did not comply with those rules because it was unable to do so. Neither the point petitioner now attempts to raise or any federal question was ever raised in any of the state courts at any time.

Apparently under Paragraph III of the Petition for certiorari petitioner is attempting to assert that it was denied the equal protection of the law as guaranteed in the Fourteenth Amendment of the United States Constitution because "the principal officers and shareholders of petitioner are Canadians."

In the first place, the record shows that petitioner is a Delaware corporation with offices in Delaware, California and Toronto, Canada.

In the second place, there is nothing in the record to show who owns the stock of corporation, the number of shares issued and outstanding or the residence or citizenship of the shareholders.

In the third place, the record does not disclose the citizenship of the directors. It does indicate that the President and Secretary resided in Toronto, Canada, and that on occasion directors' meetings were held there. However, the record shows that some of the directors (e.g. Von Bohm, Roberts, Doran) resided in California. There is no proof

as to their citizenship. Von Bohm, the managing director, a resident of California, testified he was in complete charge of petitioner's affairs with authority to dictate its policies. (Rep. Tr. p. 229.)

Finally, these matters as to citizenship were not put in issue by petitioner before the trial or appellate courts of California. After judgment was rendered against petitioner, which included the award of damages against which petitioner is here complaining, it made a motion for a new trial before the trial court. Although in its motion for a new trial petitioner alleged, as one of the statutory grounds, that the damages were excessive it did not assert in any manner that it had been denied equal protection of the law under the Federal Constitution by reason of asserted Canadian citizenship or otherwise.

Having failed to raise the point in the trial court, under California practice it could not have been raised in the appellate courts. *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 47 L. ed. 480, 23 Sup. Ct. 375. In any event, petitioner did not, nor did it make an attempt to, raise this point in its appeal to the appellate courts.

Under these circumstances, the rule of this Court is clear that it will not grant certiorari since the point now relied upon by petitioner was not raised or passed upon by the state court. (*Wilson* v. *Cook,* 327 U.S. 474, 90 L. ed. 793, 66 Sup. Ct. 663; *Williams* v. *Kaiser,* 323 U. S. 471, 89 L. ed. 398, 65 Sup. Ct. 363.)

III.

No Federal Question Is Involved in This Case

This case involved an action for dissolution of a corporation and a cross-complaint for specific performance of a contract and damages.

The damages awarded in this case were (a) for a loss of profits caused to the respondent by reason of the breach of contract on the part of petitioner arising out of its failure

to sell and deliver its oil to the respondent and (b) a sum equivalent to the amount of damages awarded against the respondent in favor of the Intervenor, Ralph Edgington, for his damages occasioned by breach of contract on the part of respondent which in turn was caused by petitioner's breach of contract committed with full knowledge of the existence of the Edgington contract.

In determining this matter and arriving at these damages the Court was construing and applying the law of the State of California.

The petitioner in paragraph II of its petition states:

> "Upon the foregoing facts, the question presented is whether the award and affirmance thereof of damages against petitioner in the sum of $138,299.43 is so clearly and unmistakably unreasonable as to constitute a denial to petitioner of the protection of Section 3359 of the California Civil Code and thus a violation of the 14th Amendment of the U. S. Constitution."

Thus, petitioner seeks to raise here simply a question of fact which was determined adversely to the petitioner by the State Courts on substantial evidence. This Court has held repeatedly that it will not review pure questions of fact decided by the State Courts. (*Milk Wagon Drivers, etc.* v. *Meadowmoor Dairies,* 312 U. S. 827, 85 L. ed. 836, 61 Sup. Ct. 552, 132 A.L.R. 1200, pet. denied, 312 U.S. 715, 85 L. ed. 1145, 61 Sup. Ct. 803; *Louisville, etc. Ry. Co.* v. *Holloway,* 246 U.S. 525, 62 L. ed. 867, 38 Sup. Ct. 379; *So. Ry. etc.* v. *Bennett,* 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. 566; *Baldwin* v. *State of Kansas,* 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. 193).

The question of damages in this case was for the trial court to determine. On appeal, the judgment of the trial court in this respect was binding if supported by substantial evidence. The appellate court specifically held that the award of damages was supported by substantial evidence, and in this connection said in part:

> "EIGHTH: *That the trial court did not correctly assess the damages.*

> "This proposition is likewise without merit. The proper measure of damage was the loss of profits suffered by defendant. (*National Oil etc. Co.* v. *Produce Refinery Co.*, 169 Cal. 740, 147 P. 963). The evidence of defendant's loss is contained in numerous exhibits and testimony found in the record, which evidence was not contradicted by any evidence produced by plaintiff. *Since this evidence is substantial and sustains the trial court's findings,* no useful purpose would be served by setting it forth *in extenso.*" (95 ACA p. 227, 236) (Italics ours)

The Supreme Court of the United States will not review questions of fact involving the amount of damages where there is substantial evidence to support the finding of the lower court in regard thereto. Even where a federal constitutional question is involved the Supreme Court will not review questions of fact decided by the State Court unless it can be shown that there was no evidence whatsoever to support the findings of the State Court. (*Milk Wagon Drivers Union etc.* v. *Meadowmoor Dairies, supra;* see also *Great Northern Ry. Co.* v. *Donaldson,* 246 U. S. 121, 62 L. ed. 616, 38 Sup. Ct. 230.)

By the same token, even where a federal law has been involved in the State Court, the Supreme Court of the United States will not review questions involving the amount of damages where the determination by the State Court has been made upon conflicting evidence. (*Louisville etc. Ry. Co.* v. *Holloway, supra; Southern Ry. etc.* v. *Bennett, supra.*)

In an effort to confuse the simple issue of fact in this case, petitioner asserts in paragraph III of its Petition, without regard to the facts on the record, that it was denied due process because of citizenship. Petitioner now alleges that its principal officers and shareholders are Canadian citizens. It even infers that the California courts, because of alleged prejudice arising out of alleged diversity of citizenship, have sanctioned legalized theft. (Petitioner's Pet., p. 11)

A complete answer to the petitioner's contention in this regard is that it has no foundation in fact. There is absolutely nothing in the record to indicate either that the principal shareholders of the petitioner are Canadians or that this fact, if it were true, had any effect whatsoever on the decision of the California courts. Certainly this Court will not *presume* that the California Courts acted in bad faith and in violation of the Constitutional guarantee of the equal protection of the law in the absence of any evidence in support of such a contention.

IV.

Damages Awarded to Respondent by the State Court Are Supported by Substantial Evidence

We believe for the reasons heretofore stated that the petition for writ of certiorari should be denied without inquiry by this Court into the evidence bearing upon the question of damages. However, the record is replete with substantial evidence supporting the award of damages in this case. As the District Court of Appeal states in its decision:

> "The evidence of defendant's (respondent's) loss is contained in numerous exhibits and testimony found in the record, which evidence was not contradicted by any evidence produced by plaintiff (petitioner)." (95 ACA 227, 236, 213 P. 2d 1)

For the convenience of this Court, however, we attach hereto as Appendix "B" reference to those portions of the record bearing particularly upon the issue of damages.

As a further aid to this Court we here reprint from our Reply brief before the California Appellate Court the portion thereof dealing with the question of damages:

IX.

The Trial Court Correctly Fixed the Damages in Favor of the Asphalt Company.

The argument of El Rio in this connection ignores the fact that the years 1947 and 1948 were boom years in the heavy oil and asphalt business. It is clear from the record that had El Rio performed its contract with the Asphalt Company it would have been exceedingly profitable for both companies. Years of effort have been devoted to developing a market for El Rio's oil. The Asphalt Company in collaboration with Edgington had shown the way. By proper blending, the non-specification asphalt could be used. Everything was set. As Mr. Chase said to Edgington: "That is what we have been looking for" [Rep. Tr. p. 808, lines 19-20]. Edgington's business was booming [Rep. Tr. pp. 800-805]. There was at all times during 1947 and 1948 a steady market for all of the asphalt which the Asphalt Company could produce from El Rio's oil [Clk. Tr. p. 127; Rep. Tr. p. 826].

When seeking to obtain the participation of the Chases, El Rio's representatives exhibited a "prospectus" wherein it was estimated that the operating profits of the Asphalt Company would be $175.00 per day [P.C.A.C. Ex. 24]. This is at the rate of $63,875.00 per year. In view of this specific inducement by El Rio it cannot now be heard to complain that the damages awarded were excessive.

It was the boom in the market which enabled El Rio to obtain its two year contract with the Douglas Oil Company; which it did secretly and without notice to the Asphalt Company [Clk. Tr. p. 13, lines 7-12]. The deal was a smart one on Douglas' part. The two year price thereunder was fixed at 53c per barrel [P.C.A.C. Ex. No. 9] whereas on January 1, 1948, the current market price of oil went up to $1.17½ per barrel [Rep. Tr. p. 825]. This increase in price demonstrates not only the continuation of the boom market, but the great advantage that El Rio would have received had it performed its contract with the Asphalt Company.

Under the circumstances here involved the proper measure of damages was the loss of profits suffered by the Asphalt Company *(National Oil Etc. Co.* v. *Produce*

Refinery Co., 169 Cal. 740). The evidence of the loss of profits suffered by the Asphalt Company is contained in exhibits in evidence and in the testimony. It adequately supports the Trial Court's finding in this connection [see in particular Rep. Tr. pp. 827 to 840]. The record discloses that El Rio made no effort at the trial to introduce any opposing or contradictory testimony with reference to damages. The Trial Court's finding in this connection rests upon uncontradicted evidence.

Counsel for El Rio raises numerous objections concerning the damages concerning which we will make comment.

(a) Counsel argues that there is no showing that El Rio was required to sell its oil at the price used in computing the loss of profits (Op. Br. p. 43). But it is clear that El Rio is required to sell its oil at the current market value thereof. During 1947 the current market price was 51¢ per barrel and during that portion of the year 1948 that is involved the current market price of the oil was $1.17½ per barrel [Rep. Tr. p. 825]. In any event during 1947 the Asphalt Company's agreement with Edgington was in effect providing for a proportionate increase in the price of asphalt in the event of an increase in the price of crude. Even with a different price, therefore, the Asphalt Company's profit would have remained the same.

(b) Counsel again argues that the agreement was merely one to process oil (Op. Br. p. 44). We have already dealt with El Rio's argument in this connection. The agreement required El Rio to sell its oil to the Asphalt Company [Clk. Tr. p. 110].

(c) El Rio complains that there is no evidence concerning the profits which the receiver would have made (Op. Br. p. 45). This is immaterial. The Cross-Complaint and the judgment were for breach of contract for failure to deliver to the Asphalt Company. The El Rio Company having brought its dissolution suit for the purpose of avoiding the obligation of its contract and of placing the Asphalt Company in a position where it would be difficult for it to enforce the contract [Clk. Tr. pp. 129-130] is in a peculiarly poor position to assert

that the Asphalt Company should be limited in such a manner. The El Rio Company was responsible for having a receiver appointed. It obtained an order enjoining the Asphalt Company from carrying on its business. This order was later modified. However, in the proceedings in connection therewith El Rio insisted that the receiver should not be required to perform or assert the contracts involved [Supp. to Rep. Tr. pp. 19, 25, 30]. The Court acceded to El Rio's demands in this connection and instructed the receiver in effect that any sales to Edgington should be without prejudice [Supp. to Clk. Tr. pp. 10 and 20; Supp. to Rep. Tr. p. 19, lines 5-12]. The records of the proceeding referred to make it entirely clear that El Rio prevented performance on the part of the receiver. Furthermore El Rio conceded at that time that no other source of oil was available to the Asphalt Company [Supp. to Rep. Tr. p. 31].

(d) El Rio argues that the price of oil used in the computation of loss of profits was incorrect because, it asserts, the Asphalt Company should have paid a higher price (Op. Br. pp. 46-47). El Rio's argument in this connection is based upon the fallacious contention that the modification as to price made during the development period was still in effect. During the period from 1941 to the end of 1943 it was agreed that the price to be paid for the oil would be related to the price which could be obtained for asphalt, in order to permit the project to continue. However, this modification of the agreement was terminated at the end of 1943 and the parties resumed the original agreement requiring that the oil should be sold at the current market price thereof [Cl. Tr. pp. 116 and 117]. In 1947 the current market price for the oil was 51¢ per barrel, and in 1948 the current market price was $1.17½ per barrel [Rep. Tr. p. 825] which were the prices used in computing the loss of profits.

(e) El Rio complains of the fact that in computing loss of profits there was included a charge of 30¢ per barrel for refining the injected distillate return to El Rio. In the past relations between the companies this charge had been consistently made and paid by El Rio. It was entirely proper to use it in computing the loss of profits. The Court was entitled to consider and

adopt the past experience and relationship between the companies in this connection. Furthermore it is perfectly clear that the refining and return of injected distillate constitutes an actual expense to the refining company. If the refining company were not permitted to make such a charge obviously El Rio would be required to accept a lower stated price for the oil. Thus the two items would compensate for each other and there would be no effect upon the computation of the loss of profits. Since the refining of the injected distillate is an actual expense and a cost to the refinery it is clearly the preferable method to make a charge for it, rather than to absorb it by paying a lesser price for the oil.

(f) El Rio argues that the damages awarded are improper because the receiver did obtain some oil from Edgington (Op. Br. p. 48). In order to meet his commitments Edgington was obliged to obtain asphalt from other sources. One method which he adopted was to purchase from the Douglas Oil Company at 75c per barrel oil which El Rio sold to Douglas at 53c per barrel. Edgington entered into an agreement with the receiver of the Asphalt Company under which the receiver purchased the oil at 75c per barrel and then manufactured the oil into asphalt and sold it to Edgington at a price of $6.50 per ton [see Rep. Tr. pp. 1166-1168, 1047-1048]. Obviously this was a forced purchase on the part of Edgington. His necessitous condition required it. This same transaction was involved in the other action *(El Rio Oils (Canada) Limited* v. *J. Warren Chase et al.*, 2nd Civil No. 16864). In that action the trial court found that the price of 75¢ paid by Edgington was forced and hence did not bring into effect the requirements of the lease that El Rio should drill additional wells when the price of oil was 75¢ per barrel. The evidence in this case was that during the period in question the market price of oil was 51¢ per barrel [Rep. Tr. p. 825]. Under those circumstances the Asphalt Company's agreement with Edgington would have required that the asphalt be sold to him at $5.50 per ton [Clk. Tr. p. 122]. Since the price of oil remained at 51¢ per barrel the escalator clause of the contract was inoperative.

However, pursuant to El Rio's insistence, the Court instructed the receiver that any transactions with Edgington were not to be deemed pursuant to any contract but merely pursuant to order of Court [Supp. to Rep. Tr. p. 19; Supp. to Clk. Tr. pp. 10 and 20]. The above transaction between the receiver and Edgington is to be viewed in the light of the court's instructions to the receiver.

(g) El Rio argues that the Asphalt Company should have mitigated its losses (Op. Br. p. 49). In this connection it is argued that there is no showing that the receiver adequately performed his duty to find another source of oil.

The Court found that no other source of oil was available [Clk. Tr. p. 128, lines 8-10]. The Court found that during the period of time for which damages were assessed the Asphalt Company required the oil produced by the Oil Company and that a ready market existed during all of that time for the asphalt which could have been produced therefrom [Clk. Tr. p. 127]. The evidence fully sustains these findings [Rep. Tr. pp. 825-827].

Indeed in the preliminary proceedings above referred to El Rio admitted that there was no other source of oil available to the Asphalt Company [Supp. to Rep. Tr. p. 31]. The fact that Mr. Edgington did obtain some *asphalt* in Santa Maria is immaterial. It was oil, not asphalt that was required by the Asphalt Company. Mr. Edgington's operation was a process of blending a heavy asphalt, already manufactured, with the lighter asphalt which he was able to manufacture. The evidence is clear that it would have been impracticable and uneconomical to transport *oil* from Santa Maria to the Asphalt Company plant then refine it and transport it further to a purchaser [Rep. Tr. p. 699, lines 1-10].

(h) El Rio argues that it was error to include as an item of damages in favor of the Asphalt Company an amount equivalent to the damages awarded to Edgington as against the Asphalt Company. This argument ignores the fact that prior to its breach of contract, prior to the time it secretly entered into its two year agreement with the Douglas Oil Company, the El Rio Company was fully informed of the contract entered

into between the Asphalt Company and Edgington covering the balance of the calendar year 1947 [Clk. Tr. pp. 122-124; Rep. Tr. pp. 802, 810]. Except for El Rio's breach of contract the Asphalt Company would have performed its agreement with Edgington. Hence El Rio's breach of contract is the proximate cause of the damage suffered by the Asphalt Company because of the awarded damages in favor of Edgington.

It is a general rule of damages that the party aggrieved shall be compensated for all detriment which in the ordinary course of things would be likely to result from the breach of contract (Civil Code Sec. 3300). Under this principle it is clearly established that where the seller has knowledge of the buyer's contracts for resale, the seller is liable for damages caused to the buyer because of his inability to perform his agreement with the subpurchaser (see *Grupe* v. *Glick*, 26 Cal. 2d 680 at p. 690; and see 88 A. L. R. 1439 at p. 1452; see also Restatement of Contracts, Sec. 334 and annotation in 36 A. L. R. 942).

Clearly the damages awarded against the El Rio Company were just and reasonable under all of the circumstances of the case.

CONCLUSION

A full reading of this record will demonstrate that precise justice has been done in this case. The petitioner invoked the jurisdiction of the California courts by commencing an action to dissolve respondent corporation. Its sole purpose in so doing was to aid it in committing a deliberate and wilful breach of contract. On defendant's cross-complaint the California courts prevented this attempt to destroy defendant by holding petitioner to the obligation of its contract, and by awarding reasonable damages for the loss occasioned by petitioner's breach of contract.

The position of the petitioner, El Rio Oil (Canada) Ltd., before the Supreme Court of the United States is aptly expressed by this Court in the following quotation:

> "The action was regularly proceeded with, and was determined against plaintiff in error on grounds which

did not involve Federal questions, and therefore it is not within our power to review the judgment of the Supreme Court of the State.

"The plaintiff in error thus sought in the state court and was given opportunity to litigate the rights claimed by it and it cannot complain that the guarantees of the Constitution of the United States were denied because the litigation did not result successfully."

(*Remington Paper Co.* v. *Watson*, 173 U.S. 443, 451, 43 L. ed. 762, 765, 19 Sup. Ct. 456.)

The petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Statement of Facts

A. Background.

In 1937 the El Rio Company drilled a well on land owned by J. W. Chase, G. S. Chase and their respective wives. Oil was discovered, but it was of a heavy gravity and high sulphur content for which there was virtually no market [Clk. Tr. p. 109, lines 1-4].

In 1938, the Chases permitted a refinery to be constructed on the leased premises by an organization known as the Oxnard Road Oil Company in which El Rio owned an interest [Clk. Tr. pp. 108-109]. The purpose of this organization was to refine and manufacture asphalt from the El Rio oil, and to endeavor to establish a market for the sale of said asphalt and hence a market for the El Rio oil [Clk. Tr. p. 108, lines 22-26]. But the project was a failure. The organization was unable to establish a market for the product [Clk. Tr. p. 109, lines 6-8]. In July, 1939, the Oxnard Road Oil Company was virtually defunct [Clk. Tr. p. 109, lines 5-6] and the refinery was in a state of disrepair and decay [Rep. Tr. p. 636].

So it was that in July of 1939 the El Rio Company was on the verge of collapse. It was still largely indebted from its drilling operations [Rep. Tr. p. 948]. It was selling very little oil, and that sporadically [Rep. Tr. p. 949]; it had practically no cash [Rep. Tr. p. 950]. It had a lease from the Chases and an oil well. But there was no market for the oil—and the refinery upon which it had pinned its hopes was a failure. It had paid no royalties to the land owners [El Rio Ex. No. 38; Rep. Tr. p. 687]. El Rio was obligated to the land owners to develop the property under the terms of the lease [El Rio Ex. No. 10]. Unless something could be done El Rio was finished.

In this dilemma the El Rio Company solicited the active participation and assistance of the Chases. There were many advantages to be gained by such a course of procedure.

Mr. Roy Roberts who in 1939 was a director and the agent of El Rio with full power to handle all of its affairs in California [Rep. Tr. p. 961] admitted that El Rio desired to obtain the participation of the land owner so that "he would understand the problem we had with that heavy oil" [Rep. Tr. p. 949, lines 15-26]. But there were many other advantages to be obtained. Capital was needed; the Chases could provide it [P.C.A.C. Exs. 15, 19 and 27]. On the spot supervision and tenacity were badly needed; the Chases could provide it, whereas the same was exceedingly difficult if not impossible for the El Rio Company to provide, principally because of its financial difficulties. Furthermore, the El Rio Company risked the loss of the lease by forfeiture or abandonment unless it secured the active cooperation and sympathetic forebearance of the land owners; and unless it took affirmative steps to market the oil produced from the well. That this was the situation is clearly demonstrated by a letter written in 1941 by El Rio's president, Mr. McLaren. He said in part as follows:

> "The refinery, which Mr. Chase will agree with me as well as the other directors, was our *only chance* to merchandise the raw product, which *we could not sell* as a crude product.
>
> I would like Mr. Chase to refresh his memory regarding discussions I had with him when Roberts, Weiss and Baron Von Bohm were not there. In a nutshell it was this:—there was no use having the oil in the ground, and a well equipped to produce oil, *and find no market for it.* Chase Bros. had financed equipment to put this oil in to a merchandising product and to establish a market *and build up a future of what could be produced* from the lands leased by Chase Bros." (Italics ours.) [P.C.A.C. Ex. No. 28.]

B. The Agreement of July, 1939.

Under the circumstances above outlined the El Rio Company instigated negotiations with the Chases. As a result of the negotiations El Rio and the Chases entered into an

agreement for the formation and operation of the Asphalt Company. The agreement was for the benefit of the Asphalt Company, which upon its formation adopted it, and at all times thereafter relied upon it and complied with its terms [Clk. Tr. p. 112].

The details of the agreement are set forth in paragraph VI of the Findings [Clk. Tr. pp. 109-111]. Basically, the agreement was that the Asphalt Company would be formed to take over and operate the refinery; El Rio and the Chases would have equal stock ownership, and each would provide an equal share of the capital that might be needed to successfully operate the Asphalt Company [Rep. Tr. pp. 644, 649, 653, 654]; the Chases would devote their personal time and attention to the management of the Asphalt Company; and the El Rio Company, for a period of time equivalent to the life of production of oil from the existing well or future wells drilled on such leased premises, would sell and furnish its oil to the Asphalt Company at the current market price thereof to the extent that such oil could be used and absorbed by the Asphalt Company in the production and sale of asphalt and other products therefrom, and further that the El Rio Company would not sell oil to anyone other than the Asphalt Company, but that the Asphalt Company could sell any such oil in excess of its own requirements. This was designed to prevent ruinous competition and in the hope that the Asphalt Company would become a major factor in the oil business in Southern California [Rep. Tr. p. 702]. The testimony and the documentary evidence in the record clearly establish this basic agreement. We will discuss the evidence in this connection in detail later in this brief.

After the contract was made in July 1949, the parties entered into the performance of it.

Pursuant thereto the parties formed the Asphalt Company [Clk. Tr. p. 111]. Immediately after its formation, the Asphalt Company adopted and ratified the agreement which had been made for its benefit and entered into the

performance of the agreement and at all times thereafter fully performed it [Clk. Tr. p. 112] and said agreement was at all times fully performed by the Chases [Clk. Tr. p. 112, line 26, to p. 113, line 2]. Furthermore the agreement was at all times performed by the El Rio Company until approximately April 7, 1947 [Clk. Tr. p. 113].

C. Early Difficulties Encountered and Surmounted

Within a short time after the agreement had been made the El Rio Company became satisfied to let the new venture shift for itself. Mr. Weiss and Mr. Roberts, El Rio's directors, departed as did Delaney, one of its employees [Rep. Tr. p. 666]. The Asphalt Company, with Mr. G. S. Chase in active charge as president and manager, was requested to take charge by Delaney who held a Power of Attorney from El Rio [Rep. Tr. p. 667]. Mr. Roberts informed El Rio's Board on October 27, 1939, that "he *presumed* that Mr. Chase was supervising refinery operations until other arrangements were made by El Rio" [Rep. Tr. p. 668]. The Asphalt Company, through Mr. Chase, actually operated El Rio's well as well as the refinery and kept the whole venture on its feet [Rep. Tr. pp. 667-670]. Although Roberts, El Rio's manager and California agent, did return, his participation was very minor. Indeed El Rio soon came to distrust him and the president of El Rio gave instructions that Roberts should not even have access to the books [Rep. Tr. pp. 486-494]. The burden for the success of the business was squarely placed upon Mr. Chase, president of the Asphalt Company, who assumed it and carried it [Rep. Tr. p. 673].

During this period of time the Asphalt Company, in performance of its agreement, devoted itself diligently to the problem and did develop a market for the asphalt and consequently an outlet for El Rio's oil. Many problems were encountered and overcome. One of the major difficulties was that the oil produced by El Rio was of such a consistency that it was difficult to manufacture asphalt

therefrom which would meet the specifications for State or Federal Government jobs [Rep. Tr. pp. 663-4]. The difficulty was to obtain a proper penetration and a proper flash point in the same product. When the required flash point was reached the penetration was not up to specification and vice versa [Rep. Tr. p. 664]. In spite of this difficulty the Asphalt Company, acting through its president, obtained contracts primarily within the City of Los Angeles and sold a considerable amount of asphalt during the first two or three years of operation [P.C.A.C. Ex. 16]. However, in 1942 and 1943 the Asphalt Company working in collaboration with Mr. Edgington worked out a solution to the problem which developed a real and substantial market for the oil produced by El Rio and the asphalt manufactured by the Asphalt Company therefrom. At Mr. Chase's suggestion experiments towards the blending of the asphalt manufactured from the El Rio oil with a lighter asphalt containing more lube oil manufactured in Mr. Edgington's refinery [Clk. Tr. pp. 119-121; Rep. Tr. pp. 699-700]. The experiments proved successful [Clk. Tr. p. 120, lines 17-18] and in 1943 and in subsequent years the Asphalt Company sold large quantities of asphalt to Edgington and as a result purchased large quantities of oil from El Rio pursuant to the 1939 agreement [Clk. Tr. p. 120, lines 20-22; P.C.A.C. Ex. No. 18].

During this crucial period in the financial life of the two companies, from 1939 through 1943, the Asphalt Company also surmounted many difficulties directly caused by El Rio. El Rio had agreed to bear an equal share of the necessary financing [Rep. Tr. pp. 642 and 654]. Robert admitted that El Rio was supposed to get out of the venture if it did not promptly put up its share of the finances [Rep. Tr. p. 951]. Although it failed to bear its equal part of the financing El Rio was not frozen out because of it. The Asphalt Company waived El Rio's default in this connection and obtained the necessary financing from the Chases [Rep.

Tr. p. 660; P.C.A.C. Exs. No. 19 and 27]. In addition to actual cash advanced to the Asphalt Company the Chases extended their personal credit by way of their endorsement upon promissory notes in order to finance the venture [Rep. Tr. p. 660]. The necessary financing was considerably increased because of El Rio's indebtedness and the fact that its creditors were pressing it [Rep. Tr. p. 670]. These bills had been incurred prior to the formation of the Asphalt Company [Rep. Tr. p. 678]. One creditor levied on the well itself and placed a keeper in charge [Rep. Tr. p. 677, lines 23-26]. As a result El Rio closed its bank account [Rep. Tr. p. 679] and requested the Asphalt Company to pay its bills direct to the creditors [Rep. Tr. pp. 679-80]. Indeed El Rio's president took it upon himself to commit the Asphalt Company to pay at least one bill without obtaining the consent of the Asphalt Company thereto [Rep. Tr. p. 679]. Although Chase repeatedly requested El Rio to contribute its share of the financing [Rep. Tr. p. 675, lines 23-25; p. 676, lines 20-25] El Rio never contributed its share [Rep. Tr. p. 676, line 26, to p. 677, line 5]. Although El Rio did on one occasion obtain $10,000.00 in California it failed to pay its local bills and sent a portion of the money to Canada [Rep. Tr. p. 677].

In spite of El Rio's virtual abandonment of the venture, the Asphalt Company and Mr. Chase as its president persisted [Rep. Tr. pp. 674 *et seq.*]. Although the agreement contemplated that Mr. Chase would act merely as general manager it became necessary for him to take over the active supervision of the operations in the refinery [Rep. Tr. p. 665] and it became necessary for him to spend many hours a day on the job [Rep. Tr. pp. 674-75]. In addition, although Mr. Weiss and Mr. Roberts of El Rio were supposed to aid in selling the asphalt, their efforts tapered off and the Asphalt Company, through Mr. Chase as its president, had to take over that phase of the operations [Rep. Tr. p. 672].

D. Interim Modification of Agreement as to Price.

During this difficult period and in the early part of 1940 the El Rio Company and the Asphalt Company entered into a mutual oral agreement modifying the original contract as to the method of fixing the price of oil sold by El Rio. This modification is set forth in paragraph XII of the Findings [Clk. Tr. pp. 116-117]. In effect, it was agreed that the Asphalt Company would continue its efforts to develop a market for the oil and that it would pay and El Rio would accept the price for the oil which the Asphalt Company was able to pay and continue in operation. In the latter part of 1943 when the venture had become a success and a substantial market had been developed this agreement was terminated and the parties resumed the original basis of fixing the price at the current market price of the oil.

E. El Rio's Interest Revived.

In 1943 the Asphalt Company reported the success of its operations and that it had some money to pay El Rio for its oil. A meeting was held at which representatives of El Rio attended and at which Mr. Chase gave a full report and account of his activities on behalf of both companies during the four year absence on the part of El Rio [Rep. Tr. pp. 689-693, and 973].

When there was no market for the oil, when the future was dark, when the venture seemed destined to fail, El Rio was satisfied to remain away and let the Asphalt Company and its president Mr. Chase carry the burden. During the difficult years El Rio appeared to appreciate this effort. Thus in his letter of December 12, 1939, El Rio's president said:

> "I appreciate very much the way you have handled the situation and I understand Weiss and Roberts are leaving for California on the 14th." [P.C.A.C. Ex. No. 43.]

On December 22, 1939, Mr. McLaren wrote:

> "I appreciate more than you can imagine all that you have done and am going to stick this thing through with you as it would be a crime to let it go by the boards now." [P.C.A.C. Ex. No. 43.]

On March 3, 1941, Mr. McLaren wrote:

> "There is no doubt in my mind that we have a good property, and I give Chase Bros. and particularly Glywn Chase all credit for the time they have put in in earnestly and honestly endeavoring to establish a market." [P.C.A.C. Ex. No. 28.]

This last expression of appreciation was at a time when the El Rio Company was beset by its creditors, when P.C.A.C. was fending off those creditors and suffering financial difficulties as a result, and at a time when the El Rio Company appeared to have lost interest in any active participation.

Thus on May 28, 1941, Mr. Chase wrote to Mr. McLaren as follows:

> "From El Rio's indifference during the last few months, it seems to me that they intended to abandon their interests here. If this is the case, kindly let me know so that I can take steps to protect our interests." [P.C.A.C. Ex. No. 29.]

Mr. McLaren hastened to deny any intent to abandon the project [P.C.A.C. Ex. No. 30], but El Rio's efforts during the period involved were confined to Mr. McLaren's letter writing.

Yet with success of the venture in 1943 came renewed interest on the part of El Rio. El Rio became particularly interested in a proposed contract with the Petrol Oil Company. This agreement was not consummated due to the fact that El Rio insisted that preference must be given to its oil whereas Petrol insisted that other production be included and the third party would not agree to the preference in favor of El Rio [Rep. Tr. pp. 715-719; P.C.A.C. Ex.

No. 41]. With El Rio's renewed interest came Mr. Von Bohm who was made managing director of El Rio in the latter part of 1943 or the early part of 1944 [Rep. Tr. p. 11]. Mr. Von Bohm had authority to dictate the policies of the El Rio Company [Rep. Tr. p. 229]. With the elevation of Von Bohm El Rio adopted an unreasoning and arbitrary attitude toward the Asphalt Company. The efforts of the Asphalt Company had created a very substantial market for the oil and the asphalt manufactured whereas no market had existed in 1939. Yet El Rio now complained that the Asphalt Company did not always take all of the oil which it could produce. Mr. McLaren, its president, complained of this condition and made threats in that connection [El Rio Ex. No. 35]. Its interest in the Petrol contract was directed toward this end but as we have pointed out, it prevented that transaction by insisting on a preference for its own oil, to which the Asphalt Company acceded. When the Petrol transaction was not consummated the Asphalt Company entered into a contract with Mr. Edgington upon more favorable terms [Rep. Tr. pp. 722-730]. Although Von Bohm still objected, the Edgington contract in 1944 received the approval of El Rio through its director, Mr. Doran, and its president, Mr. McLaren [Rep. Tr. pp. 724, 730; P.C.A.C. Exs. No. 31 and 37].

F. Modification of Agreement in May, 1944.

However, as the result of El Rio's express desire to be able to sell its full production the Asphalt Company and El Rio agreed upon a modification of the original contract of 1939. As we have above pointed out the original agreement required that El Rio should not sell its oil to anyone other than the Asphalt Company even though there should be a surplus over and above the requirements of the Asphalt Company for the manufacture of asphalt and other products. In 1944 after the protests by McLaren, after the discussions surrounding the proposed Petrol agreement and the actual contract with Edgington the parties agreed that

thereafter the El Rio Company should have the right to sell any surplus oil produced by the El Rio Company over and beyond the requirements of the Asphalt Company [Clk. Tr. pp. 117-118]. This agreement was verbal but evidence of it is contained in P.C.A.C.'s Exhibit No. 4. This exhibit is a letter addressed to the Asphalt Company and Mr. Glywn S. Chase by the El Rio Company and is signed by Mr. Von Bohm as authorized director. Although the original purports to be dated May 18, 1945, the El Rio's copy which was placed in evidence shows that it was actually written in 1944, and the Court so found [Clk. Tr. p. 117, line 26, to p. 118, line 13]. We quote in part from the letter:

> "This is to confirm in writing the verbal agreement made by you with El Rio Oils (Canada) Ltd., through Victor Von Bohm and Roy Roberts.
>
> * * * * * * *
>
> "In the event that you do not at any time take all of the oil which the well, or any subsequent well drilled by us on the property, is capable of producing, we may sell the surplus to any other available purchaser." [P.C.A.C. Ex. 4.]

It will be noted that El Rio's letter clearly recognizes the basic agreement that it will sell and deliver its oil to the Asphalt Company. It is only the *surplus* which El Rio *may* sell to any other available purchaser.

G. Continued Performance by Both Companies.

With this modification of the agreement both the Asphalt Company and the El Rio Company continued to perform it. In the ensuing years, with two minor exceptions, all of the oil produced by El Rio was sold to the Asphalt Company pursuant to the agreement. The year of 1945 was very successful for both companies. Even Mr. Von Bohm had no complaint [Rep. Tr. p. 74]. The only sales of oil made by El Rio to third parties were made to one Brown, but said sales were of surplus oil in excess of the requirements of

the Asphalt Company and were made with the express consent and permission of the Asphalt Company [Clk. Tr. p. 118, line 17, to p. 119, line 4]. In 1946, due in part to the Longshoreman's strike, [Rep. Tr. pp. 311, 768-771] the market for asphalt and for heavy oil was depressed. Other producers in the field were unable to make sales [Rep. Tr. pp. 770-771]. Von Bohm endeavored to sell oil to others but was unable to do so [Rep. Tr. pp. 768-769].

H. Additional Difficulties Are Surmounted.

However, with El Rio's renewed interest in the venture commencing in the latter part of 1943 and with the advent of Mr. Von Bohm the Asphalt Company and Mr. Chase as its president were forced to deal with a petty and arbitrary attitude on the part of the El Rio Company. At the time of the accounting and settlement in 1943 there was a balance remaining due to the El Rio Company. This was due primarily to the fact that the Asphalt Company agreed to and did assume the payment of one of El Rio's old debts [Rep. Tr. p. 693; P.C.A.C. Ex. No. 23]. Mr. Chase carefully explained that if this debt was assumed there would be a delay in payment of the balance due in El Rio's favor. In spite of this and in spite of the fact that the Asphalt Company made payment for current deliveries of oil El Rio made persistent demands for full payment of the old balance although the funds with which to make payment were not available [Rep. Tr. pp. 55-75; 735-737; El Rio Ex. No. 8].

In order to produce the heavy, sticky oil from the El Rio well it was necessary to inject distillate in order to thin the crude and aid in pumping. In order to make this operation economically possible it is necessary for the producing company to reuse the distillate. Only the net oil is sold. The purchasing company refines the oil and returns a quantity of distillate equivalent to the volume injected. The cost of this operation, termed a "put-through" charge, is approximately thirty or forty cents per barrel for each barrel of

distillate so returned. In contrast the market price of distillate is approximately $2.95 per barrel. The Asphalt Company agreed to refine and return the distillate but took the position that this operation involved a substantial cost to the Asphalt Company and that a charge should be made therefor [P.C.A.C. Ex. No. 5]. The El Rio Company accepted this contractual arrangement and during all the period of time until April 7, 1947, actually paid the put-through charge to the Asphalt Company.

At the same time the El Rio Company apparently remained dissatisfied with the put-through charge, complaining that the Asphalt Company should perform the service free of charge. The Asphalt Company continued to take the attitude that an actual expense to the Asphalt Company was incurred for which charge should be made and that if the Asphalt Company was recompensed for this service it could and would pay a higher price for the oil. Or, to put it conversely, the Asphalt Company took the position that a free return of "gas oil" or distillate involved a hidden consideration for the oil and resulted in a lower stated price for the oil than the price actually being paid.

Although the Oil Company paid the put-through charge to the Asphalt Company, it then levied a one-eighth part of this expense as a charge against the land owners' royalty which was then being paid upon a cash basis [El. Rio Ex. No. 10]. The Chases objected to this and pointed out that the expense of injecting distillate, including the expense of obtaining the refining and return of the distillate injected so that it could be reinjected, was a production or pumping expense and one which should be borne solely by the lessee under the terms of the lease [P.C.A.C. Ex. No. 37]. El Rio persistently refused to either pay the royalty in full or to make any sincere effort to reach a settlement of the matter and the argument was permitted to continue under the understanding that any royalty payments made were made and accepted on account and without prejudice [P.C.A.C. Exs. Nos. 21, 37, 40; El Rio Exs. Nos. 22, 31, 32, 44].

Although receiving payments for current oil deliveries El Rio delayed payments on account of royalty [Compare P.C.A.C. Exs. Nos. 14, 20, 22, and El Rio Ex. No. 38].

On several occasions the El Rio Company through Mr. Von Bohm sought to force an accord and satisfaction upon the land owners by forwarding checks for less than the amount due containing an endorsement thereon that the acceptance of the check would constitute payment in full [P.C.A.C. Ex. No. 37]. These checks were refused by the land owners, with a consequent further delay in payment of royalty on account.

Although the El Rio Company agreed in connection with the drilling of its second well to locate a sump hole so that it would not unduly interfere with agricultural operations on the remaining land, its manager, Mr. Von Bohm, arbitrarily violated the agreement and placed the sump hole to suit his own whim [Rep. Tr. p. 756 *et seq.*]. In connection with drilling its second well the El Rio Company through its manager, Mr. Von Bohm, entered into a disastrous drilling contract [Rep. Tr. pp. 357-8; 762-64]. The well cost several times what it should have cost to drill. As a result the El Rio Company was again in financial difficulties and unable to pay its bills. Mr. Von Bohm, El Rio's manager, saw fit to blame El Rio's difficulties upon Mr. Chase, although there is a strong indication in the record that Mr. Von Bohm had received a personal benefit by making the drilling contract [Rep. Tr. pp. 344-5; El Rio Ex. No. 14]. El Rio representatives appeared willing enough to accept Von Bohm's erroneous reports as to the cause of its financial difficulties and wrote several tough letters to Mr. Chase in the latter part of 1945 [El Rio Exs. Nos. 12, 32]. On one occasion Mr. Von Bohm ordered the El Rio well shut down. But this order was countermanded by El Rio's president, Mr. McLaren [Rep. Tr. pp. 368, 432-3]. Mr. Von Bohm, El Rio's manager, is of Hungarian extraction and of a volatile nature. He is arbitrary and of a suspicious nature [see for example P.C.A.C. Exs. Nos. 8

and 12]. In spite of the provocation and in spite of the difficulty in dealing with the unreasonable Von Bohm, the Asphalt Company and its president, Mr. Chase, treated both El Rio and Von Bohm with patience, with consideration, and with restraint.

I. The Meeting in Early 1946.

In 1945, in spite of the provocation and in spite of Von Bohm's poisonous reports, the Asphalt Company and Mr. Chase, its president, sought a full conference with all interested parties in order that the difficulties might be resolved. This conference was delayed for a period of time by El Rio [Rep. Tr. pp. 738-740, 742] but in the early part of 1946 a conference finally took place. In addition to Mr. Von Bohm, El Rio's president, Mr. McLaren, and El Rio's director, Mr. J. J. Doran, were present. All of the differences between the two companies as well as the difference between the El Rio Company and the land owners were fully discussed and settled at this meeting [Rep. Tr. pp. 743-47]. At this meeting Mr. Chase, as president of the Asphalt Company, fully explained and justified the conduct and operations of the Asphalt Company, the salaries paid its officers, the Edgington contract, the price paid for oil, and the various other matters which have been a matter of discussion between the two companies. As a result the El Rio representatives expressed themselves fully satisfied with the operation and management of the Asphalt Company [Rep. Tr. p. 744, lines 23-25; p. 747, lines 7-14; and see the minutes of El Rio's Board, Rep. Tr. p. 379]. Also at the time of this meeting, in the early part of 1946, the El Rio Company agreed that its position with reference to the royalty was erroneous, agreed that it owed the back royalty and would pay it and agreed that no further deductions would be made [Rep. Tr. pp. 732-42].

After this meeting wherein El Rio appeared to be fully satisfied it expressed no further dissatisfaction to the Asphalt Company until it suddenly and without notice filed

its Complaint for dissolution [Rep. Tr. p. 772]. As a result of the meeting Mr. Chase considered that the royalty question had been settled [Rep. Tr. p. 743]. The land owners were not notified to the contrary. The El Rio Company rendered no royalty statements to the land owners during the period from early 1946 until after the Complaint for dissolution was filed.

In 1946, however, due primarily to the Longshoremen's Strike and to a general depression in the heavy oil and asphalt business, the sales of asphalt and consequent purchases of El Rio's oil were considerably decreased. Yet, El Rio made no complaint at the time. Other producers in the field were unable to sell their oil [Rep. Tr. pp. 770-772]. Von Bohm was undoubtedly familiar with this fact. Although he tried, Von Bohm was unable to sell any oil during 1946 [Rep. Tr. pp. 157-59]. Von Bohm admitted that he did not blame the Asphalt Company or Mr. Chase for the loss of sales occasioned by the Strike [Rep. Tr. p. 311].

J. Transactions in Early 1947.

However, with the advent of 1947, it was apparent that there would be a boom in the asphalt and heavy oil business. Mr. Edgington notified the Asphalt Company that he would need lots and lots of oil [Rep. Tr. pp. 800-801]. And in the early part of January, 1947, the Asphalt Company entered into an oral agreement with Edgington for the sale of asphalt during the balance of the year 1947 upon substantially the same terms and conditions as had been the agreement in prior years. The exact terms of this agreement are set forth in the Findings [Clk. Tr. pp. 119-122; Rep. Tr. pp. 800-804]. The Asphalt Company promptly notified the El Rio company of this agreement [Clk. Tr. pp. 122-123; Rep. Tr. p. 802]. Within several weeks, however, it became apparent that there was a strong demand for the heavy oil and asphalt and Edgington's business was such that he desired and agreed to take all of the oil

that the Asphalt Company could produce from the oil produced from El Rio's wells during the balance of the year 1947, without limiting the same to his own requirements or his own production [Clk. Tr. p. 123; Rep. Tr. p. 808]. Within a short time thereafter the Asphalt Company notified the El Rio Company of this modification in its agreement with Edgington [Clk. Tr. p. 123; Rep. Tr. p. 810].

K. El Rio Executes Douglas Contract and Brings Dissolution Suit.

However, the El Rio Company through its manager, Von Bohm, had secretly been negotiating with the Douglas Oil Company. In the latter part of March, 1947, without notice to the Asphalt Company, and in violation of El Rio's agreement with the Asphalt Company El Rio executed a contract with the Douglas Oil Company under the terms of which it agreed to sell all of its oil to the Douglas Oil Company for a period of two years at a price of fifty-three cents per barrel plus a free return of distillate [P.C.A.C. Ex. No. 9]. The Asphalt Company had no knowledge or notice of the making of this contract with the Douglas Oil Company until several weeks after the filing of El Rio's Complaint for dissolution [Clk. Tr. p. 131, lines 1-12; Rep. Tr. pp. 818-823].

Von Bohm advised El Rio's president, Mr. McLaren, of his negotiations with Douglas. In response thereto, Mr. McLaren wrote to Von Bohm:

> "... We have a half interest in that Pacific Coast Asphalt Company and I presume if we have a contract we can run that to our mutual advantage." [P.C.A.C. Ex. No. 10.]

Of course this was not the case, and Von Bohm discussed the whole situation with the El Rio representatives [Rep. Tr. 390] at a meeting on or about February 3, 1947. Mr. Von Bohm admitted that at this meeting of the directors of the El Rio Company it was determined to execute the

Douglas contract and to file suit seeking the dissolution of the Asphalt Company [Rep. Tr. pp. 390-93]. But El Rio kept this decision from the Asphalt Company for over two months. The dissolution suit was not filed until April 7, 1947. It is apparent, however, that although El Rio had made this decision to scrap the Asphalt Company, it was worried about it. On April 2, 1947, El Rio's secretary addressed a letter to Von Bohm in which he said:

> "I understand from Mr. McLaren that you telephoned him last week, *on receipt of our wire,* and that you undertook to see a competent attorney at Ventura, to obtain a legal opinion as to our status in connection with the refinery." [P.C.A.C. Ex. No. 11.]

Naturally El Rio was worried. It proposed to completely repudiate an agreement of long standing and one which they knew the Asphalt Company had relied upon in making its contract with Edgington for the balance of the year 1947.

Although repeated demand was made therefor El Rio failed to produce the telegram mentioned in the above letter at the time of the trial. An order for inspection was made [Supp. to Clk. Tr.]. Demand for the telegram was made at the time of the inspection [Rep. Tr. pp. 151-152]. *Subpoena Duces Tecum* was served upon El Rio [Supp. to Clk. Tr.]. Repeated demand was made for the telegram at the time of the trial [Rep. Tr. pp. 151-52, 392]. El Rio did not produce it.

The Complaint for dissolution was filed on April 7, 1947. The Trial Court found on ample evidence that the sole motive of El Rio in filing that Complaint was to avoid its obligation of its contract with the Asphalt Company and to place the Asphalt Company in a position where it would be difficult or impossible for it to act in its own protection [Clk. Tr. p. 129, line 22, to p. 130, line 4].

L. The Asphalt Company's Effort to Avoid Litigation.

Even after the Complaint for dissolution was filed, the Asphalt Company endeavored to work the matter, without litigation. Von Bohm was uncommunicative. He merely said that he would not sell or deliver the oil to the Asphalt Company [Rep. Tr. p. 817]. In an effort to work the matter out, Mr. Chase, on behalf of the Asphalt Company, obtained an agreement from Edgington that the latter would take all of the asphalt which could be produced for a full year from that date, which was some time in April, 1947 [Rep. Tr. pp. 822-3; El Rio Ex. No. 40]. This was an important modification over the previous arrangement which had covered only the balance of the calendar year, 1947. It covered an additional three or four months and it would have covered the winter months of 1948. This was advantageous because the sale of asphalt is frequently slow during the winter period. All efforts were without avail. The die was cast. El Rio was adamant. It knew that the Asphalt Company had no other source of oil [Supp. to Rep. Tr. p. 31]. The boom in the heavy oil and asphalt market was on. El Rio proposed to take full advantage of it for its exclusive benefit. If, in order to do so, it was necessary to avoid the obligation of its contract and to abandon the Asphalt Company of which it was the joint parent, it was perfectly willing to take the risk. It is somewhat ironical that it was willing to take these drastic steps in order to make what proved to be a very poor contract with the Douglas Oil Company. For in 1948 the market price of the oil went to $1.17½ per barrel [Rep. Tr. p. 825], whereas El Rio was bound to a 53¢ price under its contract with Douglas [P.C.A.C. Ex. No. 9].

We think that a mere recitation of the facts demonstrates with clarity that the Trial Court's decision accomplishes precise and exact justice in this case. We shall proceed, however, to discuss in detail the contentions raised in El Rio's Brief.

APPENDIX B

1. Findings of Fact and Conclusions of Law
   Clerk's Transcript, pp. 106-137

2. Reporter's Transcript:

   Pages 27, line 15 to Page 29, line 7, inclusive
   Pages 212 to 220, inclusive
   Pages 387 to 393, inclusive
   Pages 411 to 417, inclusive
   Pages 468, line 11 to Page 473, line 17, inclusive
   Pages 495 to 514, inclusive
   Pages 520, line 1 to Page 523, line 13, inclusive
   Pages 530 to 546, inclusive
   Pages 579 to 581, inclusive
   Page 588
   Page 597, lines 1 to 13, inclusive
   Pages 635 to 733, inclusive
   Pages 741, line 22 to Page 744, line 26, inclusive
   Pages 751, line 7 to Page 753, line 26, inclusive
   Pages 764, line 12 to Page 772, line 4, inclusive
   Pages 799, line 16 to Page 889, line 4, inclusive
   Pages 901, line 16 to Page 904, line 12, inclusive
   Pages 921 to Page 934, line 8, inclusive
   Pages 938 to Page 961, inclusive
   Pages 983 to 986, inclusive
   Pages 1021, line 12 to Page 1023, line 25, inclusive
   Pages 1027, line 6 to Page 1030, line 9, inclusive
   Pages 1031, line 14 to Page 1040, line 3, inclusive
   Pages 1047, line 6 to Page 1051, line 11, inclusive
   Pages 1065 to Page 1066, line 19, inclusive
   Pages 1070, line 5 to Page 1115, line 4, inclusive
   Pages 1117 to Page 1126, line 10, inclusive
   Pages 1147 to 1150, inclusive
   Pages 1153 to 1229, inclusive
   Pages 1248 to 1255, inclusive
   Pages 1269 to 1411, inclusive

3. Supplement to the Reporter's Transcript:

Pages 1 to 2, inclusive
Pages 14 to 20, inclusive
Page 25, lines 4 to 20, inclusive
Pages 28 to 29, inclusive
Pages 30, line 23 to Page 31, line 4

4. Exhibits:

(a) *Pacific Coast Asphalt Co., Inc.*

Exhibit Numbers: 4, 5, 9, 10, 11, 12, 13, 14, 16, 17, 18, 20, 24, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 43, (letters from McLaren dated Sept. 28, 1939, Dec. 12, 1939, Dec. 22, 1939), 44, 46, 47, 48, 49 and 50

(b) *El Rio Oils (Canada) Limited*

Exhibit Numbers: 4, 5, 6, 7, 15, 21, 30, 35, 40, 42, 44, 45, 46, 47, 51

(c) *Ralph Edgington*

Exhibit Numbers: 1, 2, 3, 4 and 5

5. Opinion, Dist. Ct. of Appeal, 95 Advance California Appellate Reports (ACA) 227, 213 P. 2d 1